

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,	) NO. 61534-3-I
	)
Respondent,	)
	)
v.	) UNPUBLISHED OPINION
	)
BENJAMIN JAY GOODMAN,	)
	)
Appellant.	) FILED: June 1, 2009

BECKER, J. — During Benjamin Goodman’s trial for felony harassment and disorderly conduct, defense experts testified that Goodman was mentally ill at the time of the offenses and lacked the capacity to form the requisite mental states. The court rejected the experts’ conclusions, however, and convicted Goodman as charged. He appeals, arguing there is insufficient evidence to support the court’s finding that he possessed the mental state for felony harassment, and that his trial counsel was ineffective for failing to assert an insanity defense.

Because the weight and persuasiveness of expert testimony are matters for the trier of fact, and because there is circumstantial evidence that Goodman possessed the

requisite mental states, we conclude the challenged finding is supported by sufficient evidence. We also conclude that Goodman has not carried his burden of demonstrating that the decision to forgo an insanity defense was deficient performance. We therefore affirm.

### **FACTS**

Benjamin Goodman has suffered from mental illness for most of his adult life. During the years preceding the incident at issue in this case, his illness resulted in repeated hospitalizations and several terms of incarceration. His diagnoses have included bipolar and schizoaffective disorders.

On March 18, 2001, Goodman made the first of several visits to the home of Michael Peck. Around 3 a.m., Peck heard barking and the sound of someone attempting to enter his front door. When he opened the door, Goodman asked to see Peck's daughter, Jennifer. Peck did not recognize Goodman and did not know that he and Jennifer had been high school classmates. Peck told Goodman that Jennifer did not live there and asked him to leave. Goodman said he was not leaving without his wife, Jennifer. Peck grabbed a shotgun, chambered a round, and pointed it at Goodman. Although Goodman began walking away, he kept turning around, saying "I'll be back." Minutes later, Goodman reappeared in Peck's yard. Peck held him at gunpoint until police arrived and arrested him. During that time, Goodman repeatedly told Peck to shoot him.

A few weeks later, Peck received a letter from Goodman indicating he would

come see Peck when he was released from the hospital. Goodman returned as promised in May, 2001. He again asked for Jennifer. Peck told him to leave and called the police. As Goodman walked away, he told Peck he would be back.

Six years later, in August, 2007, police told Peck that Goodman had recently visited a nearby golf course in the middle of the night. He was dressed in black, wearing combat boots, and claimed he was a special forces operative working for commander Mike Peck.

On September 14, 2007, Peck received word that Goodman was walking down the road leading to Peck's home. Peck drove up to Goodman and told him to leave. Dressed in black with a special forces emblem on his sleeve, Goodman said he was on his way to meet his commander, Mike Peck, and mentioned task force "Wolf Pack." Peck told him to leave and Goodman "went into a rage." He was "jumping up and down," "yelling profanities," and yelling Peck's name and address. Peck called 911. Goodman then said "I'm going to put a bullet in the back of your head Mike Peck you mother fucker."

Peck told the 911 operator that if Goodman came near him he would defend himself. Goodman responded that Peck could not defend himself against a bullet. Goodman also yelled "you are dead" and repeatedly told Peck "I'm going to get you."

Goodman eventually began walking away but stopped periodically and blurted out profanities. When the police arrived, Goodman complied with various commands and was arrested without incident.

The State charged Goodman with felony harassment and disorderly conduct. Goodman waived his right to a jury and presented a diminished capacity defense at trial. Two experts testified on his behalf.

Dr. Kevin Peterson, a clinical psychologist, diagnosed Goodman as suffering from schizoaffective and bipolar affective disorders. He concluded that Goodman was delusional and “floridly psychotic” at the time of the offense and could not form the requisite mental states for the charged crimes. Dr. John Neer, a forensic psychologist, agreed that Goodman’s delusions precluded him from understanding the true nature of his behavior and forming the requisite mental states. The State presented no expert testimony.

In convicting Goodman as charged, the trial court found the experts’ testimony unpersuasive:

Dr. Peterson did not know and could not articulate the legal definition of “knowing.” Dr. Peterson testified that the defendant acted coherently within his delusional system and responded to internal stimuli, not external stimuli. This court finds that although the defendant may have responded to internal stimuli, all the evidence supported the fact that he also responded to external input. This court rejects Peterson’s credibility determination and assumption that Goodman told the truth about the fact that he did not make any threats.

. . . Dr. Neer had a more sophisticated analysis than Dr. Peterson as to the disorder’s connections to Goodman’s behavior and ability to form the requisite mental states for the charged crimes. Dr. Neer opined that when Goodman was challenged by Peck his angry response was an irrational act. This court rejects this analysis. Dr. Neer further acknowledged that one can demonstrate organized behavior within a delusional belief system, an opinion which this court accepts.

After rejecting the experts’ conclusions, the court found there was sufficient

circumstantial evidence to support the mens rea elements of the offenses:

This court finds that the behavior and actions demonstrated by the defendant were more organized than disorganized and irrational. The defendant demonstrated organized behavior within his delusional system. His organized behavior is evidenced by his coherent statements and his behavior in response to Peck's directions to leave and his responses to law enforcement.

There is sufficient evidence to justify the conclusion that the defendant's behavior was organized, and this court finds that he had the mental capacity to form the requisite mens rea for Felony Harassment and Disorderly Conduct.

The court noted in passing that it would have found Goodman insane at the time of the offenses had it been asked to do so, but that defense was not raised.

The court granted a first time offender waiver, sentencing Goodman to the top of the standard range -- three months -- on the felony harassment count and then releasing him to a term of 24 months of community custody. The court sentenced Goodman to a concurrent term of three months on the disorderly conduct count but released him for time served.

### **DECISION**

Goodman first contends the court's finding that he possessed the requisite mental state for Felony Harassment is not supported by sufficient evidence. We disagree.

A challenge to the sufficiency of the evidence presented at a bench trial requires us to determine whether the challenged findings are supported by substantial evidence, and whether the findings support any challenged conclusions of law. State v. Madarash, 116 Wn. App. 500, 509, 66 P.3d 682 (2003); State v. Stevenson, 128 Wn.

App. 179, 193, 114 P.3d 699 (2005). We defer to the trier of fact on any issue involving conflicting testimony, the credibility of witnesses, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). The trial court has wide latitude in determining what weight to give an expert's opinion. In re Marriage of Sedlock, 69 Wn. App. 484, 491, 849 P.2d 1243, review denied, 122 Wn.2d 1014 (1993); State v. Lord, 117 Wn.2d 829, 854-55, 822 P.2d 177 (1991) (weight to be afforded expert is a matter for the trier of fact), cert. denied, 506 U.S. 856 (1992). The court may “reject expert testimony in whole or in part in accordance with its views as to the persuasive character of that evidence.” Brewer v. Copeland, 86 Wn.2d 58, 74, 542 P.2d 445 (1975).

To convict a defendant of Felony Harassment, the State must prove the person “knowingly” threatened to cause bodily injury immediately or in the future. RCW 9A.46.020(1). A person acts “knowingly” when “he [or she] is aware of a fact, facts, or circumstances or result described by a statute defining an offense.” RCW 9A.08.010(1)(b)(i). Here, the court found that Goodman knowingly threatened Peck with bodily injury. Goodman challenges that finding on two grounds. First, he contends it ignores un rebutted expert testimony that he lacked the capacity to form the requisite mental state. But the trial court found the critical portions of the expert testimony unpersuasive. As noted above, we must defer to that decision.

Moreover, contrary to Goodman’s assertions, the court’s stated bases for rejecting that testimony are rational and generally supported by the record. As the trial

court noted, Dr. Peterson did not correctly articulate the legal definition of knowledge and erroneously concluded that Goodman probably did not threaten to put a bullet in Peck's head. A 911 tape conclusively proved otherwise. These errors alone entitled the court to reject or discount Dr. Peterson's opinion.

With respect to Dr. Neer, the court agreed with his testimony that Goodman could act purposefully and knowingly within his delusional state, but did not accept his arguably inconsistent conclusion, shared by Dr. Peterson, that Goodman's delusions precluded him from forming the knowledge necessary for felony harassment. The trial court's reasoning is not only rational, but it is consistent with the relevant caselaw. See State v. Atsbeha, 142 Wn.2d 904, 920-22, 16 P.3d 626 (2001) (upholding exclusion of expert testimony because even if defendant was acting under delusion that he was lawfully delivering cocaine as an agent of the police, such testimony "was not evidence of impairment of his ability to form the intent to deliver the controlled substance."); State v. Pirtle, 127 Wn.2d 628, 646-48, 904 P.2d 245 (1995) (in finding sufficient evidence of premeditation, court noted that while one expert opined that a psychotic episode left the defendant unable to premeditate, "[h]e also admitted a person under the influence of drugs could still carry out an intent to do something.").

Second, Goodman contends there is no expert testimony or other substantial evidence in the record supporting the finding that he acted with the requisite mental state. Expert testimony, however, is not a prerequisite to such a finding. On the contrary, effective cross-examination of defense experts or circumstantial evidence of

the defendant's mental state can be sufficient. See State v. Pirtle, 127 Wn.2d at 648; State v. Lewis, 69 Wn.2d 120, 123, 417 P.2d 618 (1966)(mental state may be inferred from circumstances surrounding commission of the offense). Viewing the record in this case in a light most favorable to the State, we conclude there is sufficient evidence to support the challenged finding.

Unchallenged findings of fact establish that Goodman acted in an organized and purposeful manner on the day of the offense. He walked nearly three miles to confront Peck. When Peck asked him to leave, Goodman became "very angry." Goodman pointed at Peck and angrily stated "I'm going to put a bullet in the back of your head Mike Peck." He also told Peck that he knew where he lived and recited his exact address. Finally, Goodman responded to external stimuli, including directions from the police and Peck's comments during the incident. These facts are circumstantial evidence that Goodman knowingly threatened to kill or injure Peck. "[T]he words and acts of a defendant immediately before, during, and after the offense are the best evidence of his state of mind at the time of the acts charged." State v. Greene, 92 Wn. App. 80, 107 n.32, 960 P.2d 980 (1998)(quoting Lee v. Thompson, 452 F. Supp. 165, 169 (E.D.Tenn.1977), aff'd, 577 F.2d 741 (6th Cir.1978)).

Significantly, both experts conceded on cross-examination that despite his delusional state, Goodman could still act volitionally and in a goal-oriented fashion. Neer went so far as to state that Goodman could "know his behavior. He can know that he was harassing someone" within the context of his delusion.



Taken together, the circumstances surrounding Goodman's threat and the experts' testimony on cross-examination provide sufficient evidence to support the challenged finding.

Goodman also contends his counsel was ineffective for failing to assert an insanity defense. To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate deficient performance and prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 889 P.2d 1251 (1995). We strongly presume that counsel was effective, and it is the defendant's burden to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d at 336. Goodman fails to demonstrate either deficient performance or prejudice.

Goodman's claim ignores statements in the record indicating that the decision to forgo an insanity defense was *his* decision, not counsel's. The State asserted in its trial brief that Goodman

refused to be evaluated for a NGI defense and has refused any offer wherein the defendant would receive any supervised probation including a misdemeanor resolution. The defendant has been on supervision with Mental Health Court three times. The defendant does not wish to return to Mental Health Court because of supervision.

The prosecutor reiterated this point at the close of the evidence, stating:

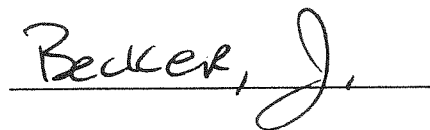
it is the defendant's choice to proceed either under a diminished capacity and/or insanity, but it is ultimately the defendant's choice, and in this particular situation, the defendant asked not to be evaluated on that basis, my understanding being because that would bring with it supervision potentially for a five-year period of time .

Defense counsel did not dispute the prosecutor's claims. In fact, she told the

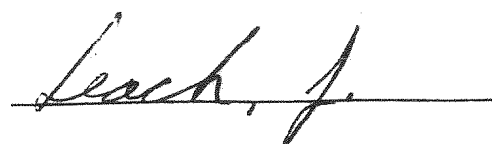
court she had intended to make a very similar point. Thus, on the record before us, it appears that trial counsel simply honored Goodman's decision not to assert an insanity defense. This was not deficient performance. Matter of Personal Restraint of Benn, 134 Wn.2d 868, 894-895, 952 P.2d 116 (1998)(no ineffective assistance claim can be made if the defendant preempts counsel's trial strategy); State v. Jones, 99 Wn.2d 735, 746, 664 P.2d 1216 (1983)(decision to assert an insanity defense rests with the defendant personally, and a competent defendant's decision to waive the defense cannot be overridden by counsel).

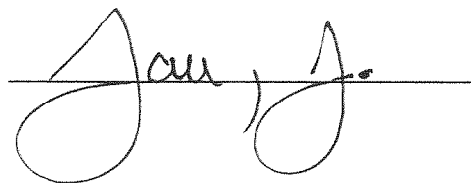
In any event, even if the decision had been counsel's, Goodman fails to demonstrate the absence of a strategic basis for that decision in the record. In fact, the record strongly suggests that the decision was sound trial strategy. As noted above, the record indicates a successful insanity defense would have exposed Goodman to a five-year civil commitment. On the other hand, his diminished capacity defense exposed him to a relatively short period of confinement and supervision. The record thus does not support Goodman's claim of deficient performance. Accordingly, his ineffective assistance claim fails.

Affirmed.

A handwritten signature in black ink, reading "Becker, J.", written over a horizontal line.

WE CONCUR:

Handwritten signature of Leach, J. in cursive script, written over a horizontal line.

Handwritten signature of Jan, J. in cursive script, written over a horizontal line.